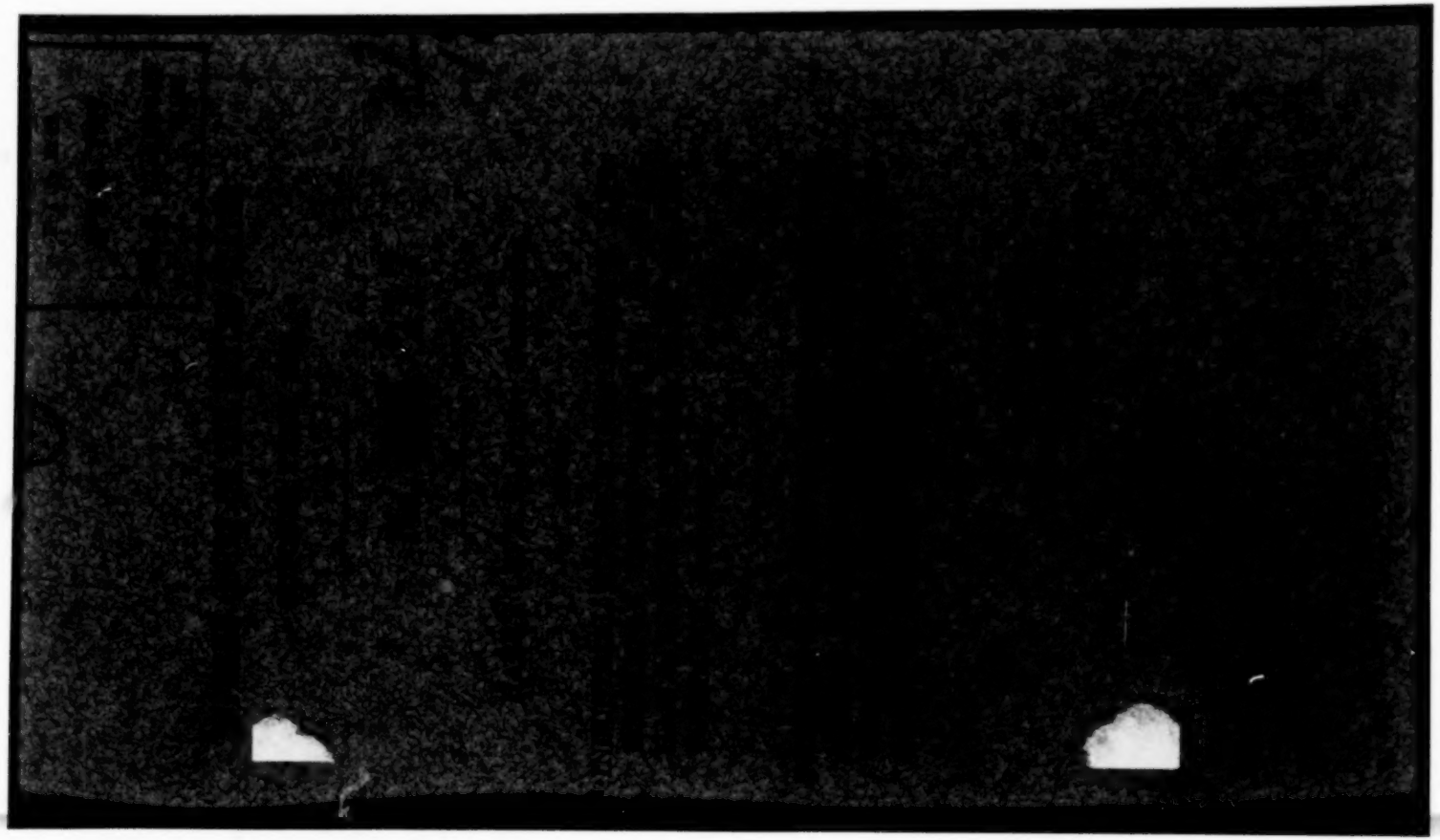

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1029.

HARRY LEVY, BANKRUPT, PETITIONER,

versus

INDUSTRIAL FINANCE CORPORATION, METROPOLITAN TRUST COMPANY, AND CHATHAM & PHENIX NATIONAL BANK OF NEW YORK CITY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

The petition of Harry Levy, bankrupt, respectfully represents:

Proceedings.

On the 10th day of December, 1924, the petitioner was adjudged a bankrupt by the District Court of the United States for the Eastern District of Virginia; on the 14th day of January, 1925, the petitioner filed his petition for discharge in bankruptcy, attached to which

petition was the recommendation of the trustee of his estate in bankruptcy and the Referee in Bankruptcy recommending the granting of such discharge.

On the 30th day of March, 1925, the respondents, Chatham & Phenix National Bank of New York City, Metropolitan Trust Company of New York City and the Industrial Finance Corporation of New York City, filed specifications in opposition to the discharge of said bankrupt (Rec. p. 9), to which said specifications the bankrupt duly filed his exceptions (Rec. p. 12). Thereafter the respondents filed an amended specification of objections to the petitioner's discharge as a bankrupt (Rec. p. 13), to which said amended specification the petitioner filed his answer (Rec. p. 57).

The Honorable District Court of the United States for the Eastern District of Virginia did on the 24th day of June, 1925, by proper order, refer to the Honorable R. T. Thorp, as Special Master, the issues raised by said specification exceptions and answer thereto, for a finding to be had by said Special Master and a report to be made by said Special Master to the court (Rec. p. 58).

The Special Master on the 11th day of September, 1925, pursuant to the Decree of Reference, made his findings of fact and reported to the court as follows (Rec. pp. 68-69):

1. That the objectors have failed to show that the written statements relied on were materially false at the times they were made.

2. That they have failed to show that the money was obtained on any known false statement in writing made by Levy.

3. That the $1,500,000 was loaned by the objectors, not because of any statement made by Levy, but upon (88) the audit made by Haskins & Sells, Certified Public Accountants, designated or accepted for that purpose by the objectors themselves.

4. That even if false the objectors have failed to show that Harry Levy had knowledge of their falsity, or in the matter of obtaining the money of the objectors for the corporation, Harry Levy acted otherwise than in good faith, therefore it is recommended that he be granted his discharge.

To which findings and report of the Special Master the objecting creditors on the 25th day of September, 1925, filed exceptions (Rec. p. 125), and upon a hearing thereon the District Court sustained said exceptions and entered a final order denying to your petitioner his discharge in bankruptcy (Rec. p. 129).

To the final judgment of the District Court, your petitioner sued out an appeal from and filed his petition to review and revise in matter of law the final judgment of said District Court.

The Circuit Court of Appeals for the Fourth Circuit on the 13th day of January, 1927, pronounced its judgment (Rec. p. 151) dismissing the petition to review and revise and affirmed the judgment of the District Court on appeal.

Facts.

The essential facts as set forth in the decision of the Circuit Court of Appeals for the Fourth Circuit are as follows:

The objecting creditors in September, 1922, made a large loan to the American Home Furnishers Corporation, a corporation whereof the bankrupt was president and a large stockholder and the endorser of the bonds evidencing said loan.

The specifications in opposition to the discharge were based upon gross misrepresentation of the value of the assets of the American Home Furnishers Corporation as evidenced by two certain paper writings, one being known as original Exhibit "A," being a statement of the assets and liabilities of said corporation prepared by Robert A. Shreffler, assistant treasurer of the corporation, and the other being known as original Exhibit "C," being a report by Messrs. Haskins and Sells, Certified Public Accountants, the latter report being predicated upon the books of the corporation, which were padded to the extent of a large sum of money and in the respect that accounts of no value were treated as live assets.

The trial court reversed the findings of the Special Master and found that the bankrupt, as an officer of the corporation, caused these statements to be delivered to the objecting creditors knowing them to be false in fact, and relying thereon the objecting creditors loaned to the corporation a large sum of money which was received by and used solely for the corpora-

tion's purposes. The trial court held that the bankrupt being the largest stockholder in the corporation and the endorser of the corporation's bonds, though he neither obtained nor received the money, nor was any part thereof used for his personal benefit, that he had obtained money or property on credit upon a materially false statement in writing which barred his INDIVIDUAL DISCHARGE, which ruling was affirmed by the Circuit Court of Appeals for the Fourth Circuit.

Legal Propositions Involved.

The specifications in opposition to the bankrupt's discharge are based upon subsection 3 of Section 14 of the Bankrupt Act of 1898, as amended by the Act of 1910, which is as follows:

> "Obtained money or property on credit upon a materially false statement in writing, made by him to any person or representative for the purpose of obtaining credit from such person."

The sole legal proposition here involved is clearly stated in the opinion in this case of the Circuit Court of Appeals for the Fourth Circuit, as follows (Rec. p. 142):

> "THIS BRINGS US TO THE REAL QUESTION OF THE CASE: IS THE BANKRUPT ENTITLED TO DISCHARGE, NOTWITHSTANDING THE MAKING OF THE FALSE STATEMENTS IN WRITING, BECAUSE THE MONEY WHICH WAS OBTAINED BY MEANS THEREOF WAS RECEIVED NOT BY HIM BUT BY THE CORPORATION?"

At page 147 of the record, the court says:

> "It is not necessary that the property should have been obtained for himself or for his benefit, but if it was obtained on his credit as principal or surety, and such credit was induced by his materially false statement in writing made for the purpose, the case is within the statute." 7 C. J. 377.

The question presented in this case was decided by the Circuit Court of Appeals for the Second Circuit in *In re* Applebaum, 11 Fed. 2d Ed. 685-686. The facts in that case are found at page 686 and are as follows:

> "The false financial statement was issued to obtain money for the corporation upon notes made by it, endorsed by him, and taken by the creditor. It was signed by the bankrupt, but the money went to the corporation, and there was no evidence that he obtained any part of it for himself, or intended to do so at the time when he issued it, except in so far as he might later withdraw it from the business."

Based upon these facts the Circuit Court of Appeals for the Second Circuit held that the bankrupt was entitled to his discharge in bankruptcy, and said:

> "The appellant relies on *In re* Bleyer, 215 F. 896, 132 C. C. A. 236 (C. C. A. 2) but that came up on exceptions to the specifications which expressly alleged that the bankrupt had obtained some part of the money lent to his corporation. That alone saved the specifications. The same is true of *In re* Dresser, 146 F. 383, 76 C. C. A. 655 (C. C. A. 2).

"If it is necessary under Section 14*b* (3), (Comp. St. 9598), to show that the bankrupt got any of the property, the evidence is not sufficient. The corporation got it, and so far as appears he never withdrew any part of it, and, although he owned all the stock, there is no evidence that he ignored the corporate entity or treated the corporate till as his own. So the case presents the question whether the word 'obtains,' in Section 14, means that the bankrupt gets the money or property himself, or whether it is enough that he is the means of getting it for a third person. To put a bare instance: Suppose the bankrupt wishes to accommodate another person and indorses his note, making a false statement as to the maker's financial ability, to secure its acceptance. The holder would be the bankrupt's creditor, but by hypothesis the money would go to the maker. A majority of the court believes that the statement would not bar the bankrupt's discharge, because he had not obtained the money.

"The English statute against false pretenses, in its original form, was interpreted as requiring the accused to get the property. Rex *v.* Garrett, 6 Cox C. C. 260; Jones *v.* U. S., Fed. Cas. No. 7499; Willis *v.* People, 19 Hun. 84; People *ex rel.* Phelps *v.* General Sessions, 13 Hun. 396, 400; Bracey *v.* State, 64 Miss. 26, 8 So. 165. It was changed (24 and 25 Vict. c. 96, §89), and today either by statute or by decision the law is generally the other (Commonwealth *v.* Harley, 7 Mete. (Mass.) 462; Commonwealth *v.* Langley, 189 Mass. 89, 47 N. E. 511; Fisher *v.* State, 161 Ark. 586, 256 S. W. 858; People *v.* Woods, 59 Cal. App. 740, 212 P. 41; People *v.* Aronson, 173

App. Div. 734, 156 N. Y. S. 396, affirmed 218 N. Y. 684, 113 N. E. 1062).

"*In re* Dunfee, 219 N. Y. 188, 144 N. E. 52, construing Section 17 (2), (Comp. St. 9601), does not touch the question. Some of the cases are to be distinguished, because the accused was indicted as accessory, State *v.* Davis, 56 Kan. 54, 42 P. 348; Sandy *v.* State, 60 Ala. 58; People *v.* Moran, 43 App. Div. 155, 59 N. Y. S. 312, affirmed 161 N. Y. 857, 57 N. E. 1120; Griggs *v.* U. S. 158 F. 572, 85 C. C. A. 596 (C. C. A. 9). It may be that Section 14*b* (3) was drawn following the statute of false pretenses, but the majority thinks that, if so, the original interpretation was the right one, and that in any case, when Congress chose the same words, it must be supposed to have accepted the original interpretation along with them."

This Honorable Court on the 18th day of October, 1926, denied a petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit. State Bank *v.* Philip Applebaum, No. 508, U. S. Sup. Ct. Adv. Op. Nov. 15, 1926, 71 L. Ed. 129.

Grounds for Certiorari.

Your petitioner most respectfully represents that the United States Circuit Court of Appeals for the Fourth Circuit having declined to follow the decision of the Circuit Court of Appeals for the Second Circuit in *In re* Applebaum, 11 Fed. 2d Ed. 685, as set forth in its opinion at page 147 of the accompanying certified transcript of Record, as follows:

> "We have given careful consideration to the case of *In re* Applebaum (C. C. A. 2nd), 11 Fed. (2) 685, which seems to give support to the contention of bankrupt; but, while we have great respect for the court which rendered that decision, we cannot follow it. In our opinion, the doctrine there announced would in effect add to the bankruptcy act a provision not contemplated by Congress, and one not in harmony with the reason and spirit of the law. It may not be amiss to note that that was a *per curiam* decision by a divided court."

1. And having so construed subsection 3 of Section 14*b* of the Bankrupt Act as to give such meaning and effect thereto as is in direct conflict with the construction given said subsection 3 of Section 14*b* by the Circuit Court of Appeals for the Second Circuit, there is created an irreconcilable conflict of decision by said circuits.

2. The legal propositions involved in this petition are of great importance to the general public and the parties in that it is proper that subsection 3 of Section 14*b* of the National Bankruptcy Act should be construed by this Court in order that there may be uniformity of construction of said National Bankruptcy Act.

Your petitioner respectfully presents herewith as a part of his petition a certified transcript of the record in the said Circuit Court of Appeals for the Fourth Circuit, and further presents herewith a brief in support of his petition which deals more fully with the questions involved herein.

Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

HARRY LEVY,
By S. M. BRANDT,
His Attorney.

UNITED STATES OF AMERICA,
State of Virginia,
City of Norfolk, to wit:

S. M. Brandt, being duly sworn, says that he is counsel for Harry Levy, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

S. M. BRANDT.

Subscribed and sworn to before me this 31st day of March, 1927.

[SEAL.] SELMA MORRIS,
Notary Public.

My commission expires August 3, 1929.

Certificate of Counsel.

I, S. M. Brandt, of the city of Norfolk, State of Virginia, an attorney regularly admitted to the practice in the Supreme Court of the United States of America and the attorney for the petitioner herein, do hereby certify that in my opinion the foregoing petition is well founded in matter of law; that in my opinion the case is one in which the prayer of the petitioner should be granted by this Court.

Dated Norfolk, Virginia, March 31st, 1927.

S. M. BRANDT.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1029.

HARRY LEVY, PETITIONER,

vs.

INDUSTRIAL FINANCE CORPORATION, METROPOLITAN TRUST COMPANY, AND CHATHAM & PHENIX NATIONAL BANK OF NEW YORK, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement.

One ground of error on the part of the Circuit Court of Appeals for the Fourth Circuit is respectfully submitted for the allowance of a writ of certiorari.

The said Circuit Court of Appeals for the Fourth Circuit so construed sub-section 3 of Section 14*b* of the Bankruptcy Act in this case as to create irreconcilable conflict with the construction thereof by the Circuit Court of Appeals for the Second Circuit in *In re* Applebaum, 11 Fed. 2nd Ed. 685-686.

The Circuit Court of Appeals for the Fourth Circuit held upon a like state of facts in this case as existed *In re* Applebaum, 11 Fed. 2nd Ed. 685-686, that the bankrupt is, as an individual, upon his petition for discharge from his individual liabilities, deprived of discharge under sub-section 3 of Section 14*b* of the Bankruptcy Act, if, while acting as an officer of a corporation, he obtains for the corporation money or credit upon a false written statement of the corporation's financial condition, though he obtained or received no part of such money or was any credit extended to him individually.

The ground for such ruling is that the bankrupt as a stockholder in the corporation and endorser of its paper of necessity profited thereby.

The Circuit Court of Appeals for the Second Circuit *In re* Applebaum, *supra,* decided that the bankrupt, though his relation to the corporation was the same as that of your petitioner, having obtained no part of the money or credit, was not deprived of his individual discharge.

This Honorable Court in State Bank *vs.* Philip Applebaum, No. 508, refused a writ of certiorari on October 18, 1926, to the judgment of the Circuit Court of Appeals for the Second Circuit. 71 L. Ed. 129.

Facts.

The facts being uncontroverted in so far as applicable to the question here presented, have been concretely stated by the Circuit Court of Appeals for the Fourth Circuit in its opinion, at page 142 of the accompanying certified transcript of record:

> "This brings us to the real question of the case: Is the bankrupt entitled to discharge, notwithstanding the making of the false statements in writing, because the money which was obtained by means thereof was received not by him but by the corporation? In passing upon this question it must be remembered that not only was bankrupt the one who actually obtained the money by means of the false statements, but also that credit was extended to him as well as to the corporation. The principal debt owing by his estate is that which arose out of the obtaining of this money; *and, while the money did not go into his estate, it did go into the coffers of a corporation which he controlled and of which he was one of the principal stockholders.*"

Legal Propositions Involved.

Grounds for Certiorari.

Uniform construction of the National Bankruptcy Act, especially so important a provision thereof as sub-section 3 of Section 14*b*, is essential to the proper administration thereof.

It is most deferentially submitted:

The Circuit Court of Appeals for the Fourth Circuit has in this case construed sub-section 3 of Section

14*b* so that the president or other officer of a corporation is denied his individual discharge if he is a party to the corporation obtaining money or credit upon a false written financial statement made by the corporation. The Circuit Court of Appeals for the Second Circuit has *In re* Applebaum, *supra*, given a contrary construction to sub-section 3 of Section 14*b*.

This Honorable Court has denied a review by certiorari of the ruling by the Second Circuit. State Bank *vs.* Philip Applebaum, No. 508, U. S. Sup. Ct. Adv. Op. Nov. 15, 1926, 71 L. Ed. 129.

This Honorable Court, however, expressed no opinion upon the denial of said writ of certiorari (*supra*).

In the case of *In re* Applebaum the Circuit Court of Appeals for the Second Circuit, at page 686, said:

> "The appellant relies on *In re* Bleyer, 215 F. 896, 132 C. C. A. 236 (C. C. A. 2), but that came up on exceptions to the specifications which expressly alleged that the bankrupt had obtained some part of the money lent to his corporation. That alone saved the specifications. The same is true of *In re* Dresser, 146 Fed. 383, 76 C. C. A. 655 (C. C. A. 2).
>
> "(6) If it is necessary under Section 14*b* (3), (Comp. St. No. 9598), to show that the bankrupt got any of the property, the evidence is not sufficient. The corporation got it, and so far as appears he never withdrew any part of it, and, although he owned all the stock, there is no evidence that he ignored the corporate entity or treated the corporate till as his own. So the case presents the question whether the word 'obtains,' in Section 14, means that the bank-

> rupt gets the money or property himself, or whether it is enough that he is the means of getting it for a third person. To put a bare instance: Suppose the bankrupt wishes to accommodate another person and indorses his note, making a false statement as to the marker's financial ability, to secure its acceptance. The holder would be the bankrupt's creditor, but by hypothesis the money would go to the maker. A majority of the court believes that the statement would not bar the bankrupt's discharge, because he had not obtained the money. The burden of proof is on the opposing creditor."

The Circuit Court of Appeals for the Fourth Circuit supports its ruling by the rulings in the cases of *In re* Hammerstein, 189 Fed. 37, and *In re* Aldridge, 168 Fed. 93, and quotes at length from the case of *In re* Dresser, 144 Fed. 318, decisions of the district courts of New York in the Second Circuit, cited and explained by the Circuit Court of Appeals for the Second Circuit in *In re* Applebaum, *supra.*

The Circuit Court of Appeals for the Fourth Circuit therefore grounded its decision in this case upon decisions of district courts of the second circuit, though overruled by the Appellate Court of said circuit in its construction of subsection 3 of Section 14*b*, which the Circuit Court of Appeals for the Fourth Circuit declined to follow. In its opinion at page 147 of the accompanying certified transcript of record it says:

> "We have given careful consideration to the case of *In re* Applebaum (C. C. A. 2nd), 11 Fed. (2) 685, which seems to give support to the contention of bankrupt; but while we have great

> respect for the court which rendered that decision, we cannot follow it. In our opinion, the doctrine there announced would in effect add to the bankruptcy act a provision not contemplated by Congress, and one not in harmony with the reason and spirit of the law. It may not be amiss to note that that was a *per curiam* decision by a divided court."

It is therefore most respectfully submitted that, in this state of conflict of decision between the Circuit Court of Appeals for the Fourth Circuit and the Circuit Court of Appeals for the Second Circuit, it is proper that a writ of certiorari should be awarded to the judgment of the said Circuit Court of Appeals for the Fourth Circuit.

Conclusion.

Your petitioner respectfully submits, for the reasons assigned and because of such conflict of decision of the Circuit Court of Appeals for the Fourth Circuit and the Circuit Court of Appeals for the Second Circuit, and because an important question of Federal law has been decided by said Circuit Courts of Appeals which has not been decided but should be settled by this Honorable Court, a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

S. M. BRANDT,
Attorney for Petitioner.

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